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In the Supreme Court of the United States

OCTOBER TERM, 1968

ALABAMA POWER COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION AND THE SECRETARY OF AGRICULTURE

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1283

ALABAMA POWER COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1083

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APPELLANTS

v.

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INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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These are appeals from judgments of three-judge district courts convened pursuant to 28 U.S.C. 1336

and 2325, dismissing for lack of jurisdiction complaints against a general rate increase order of the Interstate Commerce Commission. We submit this joint memorandum on behalf of appellees the United States, the Commission and the Secretary of Agriculture (a party only in No. 1283).

STATEMENT

For many years, the nation's railroads have reacted to increases in costs and corresponding declines in their earnings by requesting the Commission from time to time to authorize general, across-the-board increases in their freight rates—generally by a stated percentage.[1] The Commission responds to such a request by holding an investigation in which the principal issue is whether the railroads' costs and revenue needs justify permitting the proposed rate increases to go into effect.[2] Thus, in the proceedings

[1] Instead of simply publishing new rates subject to possible investigation and suspension by the Commission, as the law on its face permits, the railroads affirmatively seek Commission approval for two reasons: to obtain modification of outstanding Commission-prescribed rates on various of the commodities carried; and to get relief from inadvertent violations of the long-short haul provisions of Section 4 of the Act, 49 U.S.C. 4. When the Commission gives its approval to a general rate increase, it clearly states, as it did in this case, 332 I.C.C. 714, 715, 792, that it is neither prescribing rates nor passing on the lawfulness of any particular rate. See *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry. Co.*, 284 U.S. 370.

[2] Under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), the Commission may investigate a proposed tariff with or without suspension.

involved in these cases, the Commission, after investigating the general increases proposed by the Class I railroads on March 11, 1968, concluded in an interim report issued on November 25, 1968, that the railroads had a critical need for additional revenue, without which they would be unable to continue to provide adequate service; its final report of January 9, 1969, incorporated this conclusion and in addition approved in a general way, with some modifications, the proposed allocation of the increases thus found necessary among various commodities.[3]

A group of shippers commenced the *Alabama Power* case (here in No. 1283) in the District Court for the District of Columbia as a class action seeking to set aside the Commission's findings as to the railroads' costs and revenue needs. Under the authority granted him by 7 U.S.C. 1291(b) and 28 U.S.C. 2323, the Secretary of Agriculture intervened as a plaintiff to assert the interests of agricultural shippers. The Class I railroads intervened as defendants, claiming that the district court had no jurisdiction to review the Commission's orders; the Commission made no objection to judicial review and defended its order on the merits; and the United States, a statutory defendant, took a neutral position. With Circuit Judge

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[3] The Commission's interim order is published at 332 I.C.C. 590, and its final order is published at 332 I.C.C. 714; they are set forth as J.S. (No. 1283) Apps. B and C. The unreported opinion of the court in *Alabama Power* is set forth as J.S. (No. 1283) App. A. The opinion of the court in *Atlantic City Electric* is reported at 306 F. Supp. 338, and is set forth in J. S. (No. 1083) App. 1a-14a.

Wright dissenting, the three-judge district court held, on the authority of *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.), that a general rate increase order was not directly and immediately reviewable. It held that plaintiffs' recourse was rather to go before the Commission with challenges to particular rates under Sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. 13, 15, and to seek judicial review, if necessary, of the Commission's resulting decisions.

In the meanwhile, the *Atlantic City Electric* case (here in No. 1083) had been begun in the District Court for the Southern District of New York by a group of users of bituminous steam coal. Several state agencies intervened as plaintiffs asserting their concern with increases in rates for grain and feed, and again the Class I railroads intervened and asserted lack of jurisdiction, while the United States took a neutral position.[4] The Commission, reading the complaints of the appellant coal users and the other plaintiffs as being concerned only with the increased rates on particular commodities, argued that their claims—unlike the more general claims asserted in *Alabama Power*—were not subject to direct review under a proper reading of the doctrine established in *Algoma, supra.* The district court agreed that the plaintiffs' claims were presently unreviewable, stating that while the plaintiffs attacked the procedures followed in the general revenue proceeding, their real

[4] The Secretary of Agriculture is not a party in No. 1083, and was not below.

grievance was with the higher rates on the particular commodities of interest to them; these grievances, it held, were required to be asserted in proceedings under Section 13.[5]

DISCUSSION

Algoma Coal & Coke Co. v. *United States*, *supra*, and the three-judge court cases following it[6] have established that a shipper can attack in court particular rates increased under a general rate order only after filing a complaint with the Commission pursuant to Sections 13 and 15 of the Act challenging those rates as not just and reasonable. Thus, shippers cannot sue with "[t]he object * * * to enjoin putting [particular] increased rates into effect," 11 F. Supp. at 491, but rather must exhaust the statutory procedures for contesting the reasonableness of particular rates even though they have been raised as a result of a Commission-authorized general rate increase.

The suit in *Alabama Power*, in contrast, challenges not the lawfulness of particular rates but the Com-

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[5] In a recent case decided by a different statutory three-judge panel of the District Court for the District of Columbia, the same result was reached. Plaintiff attacked the same order here in question, but only as it authorized increased rates on radio and television sets and electronic components. *Electronics Industries Association* v. *United States*, D. D. C. Civil No. 1059-69, decided April 2, 1970. Time for noting an appeal has not expired in that case.

[6] *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla.) affirmed *per curiam*, 352 U.S. 1021; *Koppers Company, Inc.* v. *United States*, 132 F. Supp. 159 (W.D. Pa.).

mission's general findings as to the railroads' need for additional revenue as justification for a proposed across-the-board rate increase. Accordingly, taking into account the trend of this Court's recent decisions in favor of reviewability, see, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, as well as the obvious causal relationship between the Commission's action and increased charges to shippers, the Commission concluded that *Algoma* did not apply in this situation, and in the court below it defended its order and findings on the merits. The United States and the Secretary of Agriculture agree with the Commission that the complaint in *Alabama Power*—alleging that substantial evidence did not support the Commission's conclusion that a general rate increase is warranted—states a claim warranting direct judicial review.

The question whether immediate review can be had of the Commission's general findings in support of an across-the-board rate increase is a question with important practical significance for both shippers and the railroads. Of substantial public concern would be the enormous cost to the nation's shippers of higher rates collected while the general issues are considered piecemeal in Section 13 proceedings. There is thus considerable practical logic in Judge Wright's dissenting observation in *Alabama Power* that the Commission's findings respecting the carrier's general revenue needs should be reviewable directly and immediately. Indeed if a challenge to such findings is improper in a Section 13 proceeding, as the Commission once appears to have ruled,[7] then, under the decision below, the cost and revenue findings which are

the foundation of a general rate increase order could not be reviewed at all.[8]

On the other hand, serious problems would be presented to the railroads, particularly those in precarious financial condition, if across-the-board interlocutory relief were given against rate increases as an incident of reviewability. A temporary restraining order or preliminary injunction staying a Commission general revenue order ultimately held valid could result in the loss of large amounts of urgently needed rail revenues.[9] Thus, an approach to judicial review that contemplated such interim relief would raise serious questions.

Therefore, we agree with the appellants that the availability of judicial review of the claims as-

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[7] The Commission appears to have taken this position in 1958 in *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 387.

[8] The court below in *Alabama Power* did not decide or discuss whether the Commission's findings on costs and revenue needs in a general rate proceeding could be challenged by a shipper in a Section 13 proceeding before the Commission. The court in *Atlantic City Electric*, held that such a challenge would be proper in a Section 13 proceeding.

[9] In the present case, the railroads estimated before the Commission that their proposed rate increase would produce increased revenue of $466.2 million—some $89.2 million short of annual revenue needed simply to cover their increased expenses. 332 I.C.C. at 602. The total income of the Class I railroads in 1968 was $542.2 million and their rate of return on net investment was estimated to be 2.58 percent. 332 I.C.C. 612. Thus each month of delay in a rate increase would be very costly, with perhaps as much as $40 million per month in revenue lost.

serted in *Alabama Power* (No. 1283) is an important question that deserves plenary consideration by this Court. The *Atlantic City Electric* case (No. 1083, in which the Secretary of Agriculture is not a party) presents, however, a special problem, being poised somewhat uncertainly between *Algoma* and *Alabama Power*. As noted, the Commission argued non-reviewability below in this case, reading the complaints as attacks on particular rates rather than on the general aspects of the Commission's order, and the district court seems to have agreed. If this view of the case is proper, the decision below was correct under the *Algoma* doctrine, but if the issues raised in the district court should be viewed more broadly, then the *Atlantic City Electric* case should be treated on the same basis as *Alabama Power*. Consistent with its position below, the Commission believes that *Atlantic City Electric* involves only an attack on particular rates, and accordingly that the decision below should be affirmed summarily. The United States takes the view that this subsidiary question cannot appropriately be resolved at this stage of the case and therefore that the Court should give plenary consideration to No. 1083 as well as No. 1283.[10]

[10] We agree with the appellants that this Court has jurisdiction of both appeals under 28 U.S.C. 1253. *E.g., City of Chicago* v. *United States*, 396 U.S. 162.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted in No. 1283. As to No. 1083, the Interstate Commerce Commission believes that the judgment of the district court should be affirmed and the United States believes that probable jurisdiction should be noted.

Respectfully submitted.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL. TO AFFIRM

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May 1970

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